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Supreme Court of the United States

October Term, 1976
No. 76-524

IN THE MATTER OF THE TRUST KNOWN AS
GREAT NORTHERN IRON ORE PROPERTIES

CHARLES S. ARMS and ELIZABETH P. ARMS,
Petitioners,

vs.

WILLIAM W. WATSON, LOUIS W. HILL, JR.,
HARRY L. HOLTZ, JOSEPH S. MICALLEF,
Trustees of the Great Northern Iron Ore Properties Trust
and
BURLINGTON NORTHERN INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Minnesota

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TABLE OF CONTENTS

Petition for Writ of Certiorari to the Supreme Court of Minnesota ---- 1

Opinions ---- 1

Jurisdiction ---- 2

Question Presented ---- 2

Statute Involved ---- 3

Statement of the Case ---- 3

—The Origin of the Trust ---- 3

—The Royal Gift ---- 4

(1) The Natural Ore Has Ended ---- 6

(2) Vast Reserves of Taconite Remain ---- 6

—The Proceedings Below ---- 7

(i) The Trial Court's Holding ---- 7

(ii) Trust Created Because of Hepburn Act ---- 10

(iii) The Holding of the Minnesota Supreme Court 12

Reasons for Grant of the Writ ---- 14

1. The Minnesota Supreme Court has misconstrued the Commodities Clause of the Hepburn Act ---- 14

2. This Court has not looked at the Commodities Clause of the Hepburn Act for 28 years and what it then ruled does not justify the Minnesota Supreme Court's interpretation of the statute ---- 14

Conclusion ---- 18

APPENDIX: (Under Separate Cover)

Opinion of the Supreme Court of Minnesota, ___ Minn. ___, 243 N.W.2d 302 ---------- A1

Order On Rehearing ---------- A12

Opinion of the Trial Court ---------- A13

Judgment in the Supreme Court of Minnesota --- A66

TABLE OF AUTHORITIES

Cases

Delaware, Lackawanna and Western Railroad Company v. United States (1913), 231 U.S. 363 ------ 14

Hill v. Reynolds (D.C. Minn., 1948), 75 F. Supp. 408 11

Reynolds v. Hill (8th Cir., 1950), 184 F.2d 294 ------ 11

United States v. Elgin, Joliet & Eastern Railway Co. (1936), 298 U.S. 492 ----------15, 16, 17

United States v. Reading Company (1920), 253 U.S. 26 ---------- 15

United States v. South Buffalo Railway Co. (1948), 333 U.S. 771 ----------15, 16, 17

Statutes

The Hepburn Act, 49 U.S.C. §1(8) ---------2, 3, 4, 5, 7, 8, ----------10, 11, 12, 13, 14, 17, 18, 19

28 U.S.C. 1257(3) ---------- 2

28 U.S.C. 2101(c) ---------- 2

RECORD REFERENCES

Reference will be made to the proceedings below by symbol, as follows:

Cert. App.	refers to the printed Appendix accompanying the Petition for Certiorari in this Court.
T	refers to the typewritten transcript of trial proceedings.
A	refers to the printed Appellants' Appendix of 114 pages in the court below.
SR	refers to the printed Supplemental Record of 521 pages in the court below.
Arms Ex.	refers to Exhibits offered by Mr. and Mrs. Charles S. Arms, who, in response to the trust construction suit filed by the Trustees, entered appearance as Petitioners.
Trustees Ex.	refers to Exhibits offered by the Trustees.
B-N Ex.	refers to Exhibits offered by Burlington Northern Inc.

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PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Minnesota

Now come Charles S. Arms and Elizabeth P. Arms, Petitioners, and pray that this Court issue its writ of certiorari to bring here for review the judgment of the Supreme Court of Minnesota in Causes Nos. 44775 and 44776 on its docket.

OPINIONS

The opinion of the Supreme Court of Minnesota, by Mr. Justice Peterson, is reported in ___ Minn. ___, 243 N.W.2d 302 and is reproduced in the Appendix hereto, printed under separate cover. (Cert. App. 1.)

The opinion of the district court, Second Judicial District of the State of Minnesota, sitting in St. Paul, by Judge

Segell, is not reported, but is reproduced in the Appendix hereto. (Cert. App. 13.)

JURISDICTION

The judgment of the Supreme Court of Minnesota is dated and was entered April 23, 1976 (Cert. App. 1, 12, 66); the order on rehearing was dated and entered July 19, 1976. (Cert. App. 12.)

This Court has jurisdiction to review under 28 U.S.C. 1257 (3) and 2101(c).

QUESTION PRESENTED

This case presents the question:

Whether the Minnesota Supreme Court judgment misconstrues and violates the Commodities Clause of the Hepburn Act, 49 U.S.C. §1(8) in ordering vast iron ore lands on the Minnesota Mesabi Iron Range (which were placed in trust in 1906 by James J. Hill for the benefit of holders of trust certificates of interest originally issued to the stockholders of Great Northern Railway, of which Hill was the executive head and principal stockholder, one such certificate for each share of stock, and presently held by approximately 10,000 persons, corporations, and other holders, because he considered Great Northern Railway, one of the two major haulers of Mesabi ore, barred by the Hepburn Act from having "*any* interest, *direct or indirect*" in the Mesabi mines) to be conveyed upon the termination of the trust, to Burlington Northern, Inc., which, as successor to the business and interests of Great Northern Railway, is subject to the same Hepburn Act bar as was Great Northern, or whether such conveyance is compatible with the Hepburn Act.

STATUTE INVOLVED

This case turns on the Commodities Clause of the Hepburn Act, enacted June 29, 1906, effective June 1, 1908, Ch. 3571, §1, 34 Stat. 584, now codified in the form in which it was enacted as 49 U.S.C. §1(8). The statute, with the portions thereof now relevant italicized, says:

> "It shall be unlawful for any railroad company to transport from any state, territory, or the District of Columbia, to any other state, territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, *mined, or produced by it, or under its authority*, or which it may own in whole or in part, or *in which it may have any interest, direct or indirect*, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."*

STATEMENT OF THE CASE

This case concerns the ownership of vast iron ore lands on the Mesabi Iron Range in Minnesota, now held in trust.

These properties will go either to the approximately 10,000 certificate holders upon the termination of the Trust, or to Burlington Northern, Inc., successor to, and subject to the Hepburn Act restrictions imposed upon, the Great Northern Railway, of which James J. Hill was the driving wheel.

—The Origin of the Trust

James J. Hill, the Empire Builder, and his son, personally acquired in the period 1897-1906 interests in 65,000 acres of iron ore lands on the Mesabi Iron Range. (Cert.

---

*Emphasis supplied throughout except as otherwise noted.

App. 2, 18-27, 34, 54.) Title to the ore lands or interests therein, was held by corporations, the stock of which Hill bought. (Cert. App. 17-19.)

Hill faced a dilemma.

His interest in the ore lands was in the freight revenue the mining of the ore would generate for Great Northern in hauling the ore to the iron ore ports at the head of the Great Lakes. (Cert. App. 36, 40-41, 55, 57.) He recognized, the trial court found, that Great Northern could not hold ore lands, or stock in the companies that owned the lands, because of limitations in its charter (Cert. App. 43-44, 57), restrictions in the Minnesota statutes (Cert. App. 44-45), prohibitions of the Interstate Commerce Act (Cert. App. 45), decisions of this Court (Cert. App. 45, 48-49), the personal philosophy of James J. Hill, who saw in any attempt by the railway or those connected with it to mine the ore and transport it to market, a conflict of interest (Cert. App. 46-47), and—what for present purposes is important—the restrictions of the Commodities Clause of the Hepburn Act. (Cert. App. 45-46, 58.)

—The Royal Gift

Hill's solution was the "Royal Gift." (SR 198.) This was effected by:

1. *Transfer of the properties to Lake Superior Company, Limited,* formed on July 25, 1899, as a Michigan limited partnership association, by James J. Hill, his son, James N. Hill, and Robert I. Farrington, his close business associate, then Comptroller for Great Northern and later its Vice President. (Cert. App. 2, 24.) The properties (stock in companies that owned the ore lands) were conveyed to Lake Superior Company, Limited, pursuant to contract of October 20, 1899. (Cert. App. 2, 24, SR 110.) James J. Hill explained: "I turned them over to a company known as the Lake Superior

Co., to hold them in trust for the shareholders" of Great Northern. (SR 8.) However, this was a temporary disposition—until plans could be formulated for a permanent solution of the problem. The trouble was that "This trust, the Lake Superior Company Trust, would expire in about ten years" whereas "the mining of these ores would run over a great many years * * *." And so, "the trustees were changed." (Knutson Legislative Committee Hearings of February 14, 1907, SR 80.)

2. *Formation of the Trust in Suit.* The original Trustees were James J. Hill's sons, Louis W. Hill, and Walter J. Hill, his son-in-law James N. Hill, and Edward T. Nichols, Third Vice-President, Assistant Treasurer, and Secretary of Great Northern. (Cert. App 14.) Lake Superior Company, Limited, conveyed all of the securities representing ore properties to the Trustees, and the Trustees in turn issued 1,500,000 shares of participating interest in the Trust: one share in the Trust for each share in Great Northern Railway Company. The Trust Agreement specified (A-8, ¶ 5) that "each original beneficiary" would receive a certificate evidencing his interest in the Trust "equal to the number of shares of stock of the Great Northern Railway Company" registered in his name on the books of the company at the close of business on December 6, 1906. (Cert. App. 3.) The certificates of interest are listed on the New York Stock Exchange (Cert. App. 3) and have been since 1910 (T 18), and are freely traded. (SR 486.) As of April 20, 1973, the latest date shown in the Record, there were 9,637 holders of certificates of interest, the smallest holding being a single share, the largest 166,682, and the mean: 156. (Trustees' Answer to Arms Interrogatory 33.)

The trust device thus accomplished Hill's purposes: (1) it relieved him, and the railroad, of violations of law, including the Commodities Clause of the Hepburn Act,

and the conflict of interest that would arise were it, or persons connected with the railroad, to own the property or any interest therein, or mine the ore the railroad would haul to market; and (2) it provided assurance that Great Northern Railway would get the freight business—which was the basis of Hill's interest in the ore lands.

The trial court so found. (Cert. App. 40, 44-46.)

The last of the separate companies that held the ore lands was liquidated in 1956 and its properties, along with all the others, passed to the Trustees. (SR 246-247.)

(1) The Natural Ore Has Ended

James J. Hill, in the period 1903-1908, when mining of the Mesabi was just beginning, estimated there were about 500 million tons of natural ore on the property. (Cert. App. 35.) The subsequent 67 years of mining was to prove the accuracy of this estimate. A total of "457,605,-775 tons of ore had been mined from the iron ore properties held by the Trust" through 1972, and approximately 15,923,681 tons then remained. (Cert. App. 35.) Hill hit within 95% of the total tonnage of iron ore the properties were to yield.

The natural ore has now been exhausted. The last mine, the Mahoning, closed in August, 1973. (Cert. App. 35.) However—

(2) Vast Reserves of Taconite Remain

The Trust properties today contain immense reserves of taconite. (Cert. App. 8, 35-36, 49-50, 61-63.) Plants representing an investment of hundreds of millions of dollars have been built to recover iron from the taconite. (Cert. App. 49.)

The trial court found:

> "At the present time the Trustees have 381,657,132 tons of commercially mineable taconite committed to present plants. In addition, the Trustees have leased lands containing 159,320,838 tons of magnetic taconite which are not under lease. Of the tonnage that is committed to present plants, it is estimated that it will take approximately sixty years to mine it. Of the tonnage that is not committed to present plants, there is no way of foreseeing when this tonnage might be mined, and this is similarly true of the tonnage which is not under lease. [Arms Exhibit 64]
>
> In addition to the foregoing tonnages, there is possibly an equivalent tonnage of magnetic taconite that is not commercially mineable today. The reason for this is that it is not economically feasible to mine such taconite when it lies under such a thick overburden of both raw earth and non-magnetic taconite layers. [Arms Exhibit 64]
>
> Besides the magnetic taconite, there is a vast tonnage of taconite 'sometimes in layers above or below the magnetic taconite,' which is referred to as non-magnetic taconite; however, while there are known metallurgical methods to recover it, there are no commercial plants to treat it. It is estimated that the trust properties might contain as much non-magnetic as magnetic taconite." (Cert. App. 49-50.)

—The Proceedings Below

The question below was who would get these vast properties upon the termination of the Trust.

The certificate holders?

Or Burlington Northern—which stands in the shoes of, and is subject to the same Hepburn Act limitations as, Great Northern?

The Trustees brought suit for instructions. (Cert. App. 2, A-1.)

(i) The Trial Court's Holding

The trial court held the trust properties could not be conveyed to Burlington Northern. It is one of the two principal haulers from the Mesabi. To give it an interest,

direct or indirect, as the statute puts it, in the ore lands would put it in violation of the Hepburn Act. (Cert. App. 9.) The trial court worked it out this way:

> "the Interstate Commerce Act was a vehicle standing in the way of the Great Northern Railway's transportation of commodities owned by it. Even before the enactment of the Commodities Clause of the Hepburn Act, the Interstate Commerce Commission had held in *Grain Rates of Chicago, Great Western Railway Company,* 1897, 7 Interstate Commerce Reports 33, that it was a violation of the Interstate Commerce Act for a railroad to transport commodities owned by it; that doctrine was upheld before the United States Supreme Court in *New York, New Haven and Hartford Railway Company vs. Interstate Commerce Commission,* 1906, 220 U.S. 361.
>
> On June 29, 1906, an amendment was passed to the Interstate Commerce Act which, in this litigation, has become familiarly known as the Commodities Clause of the Hepburn Act; that legislation made it unlawful for a railroad to transport, except for use in its own business, any commodity:
>
> '*mined or produced by it* or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect . . .' [Emphasis the Court's] Ch. 3591, Stat. 584, Section 1.
>
> James J. Hill was cognizant of this statute and cognizant of the fact that the railroad could not own ore property directly or indirectly if it wished to garner the iron ore freight revenues." (Cert. App. 45.)

The trial court found further:

> "If, as is now suggested by Burlington Northern, its predecessor, the Great Northern, originally had and subsequently maintained control over the ore properties, temporarily parted with possession of them, but continued to have a legal, vested reversionary interest in them, then such clauses injected into the leases executed by the Trustees of Great Northern Iron Ore Properties Trust, tying the traffic to the Great Northern Railway, were plainly illegal, because they were violations of 1] the Commodities Clause of the Hepburn Act, 2] the Interstate Commerce Act, and 3] the tenor of the United States Supreme Court cases covering such matters; moreover, they would also have violated the Charter of the Great Northern. It is clear that *the railroad had to be completely divorced from the ore properties at all times and remain divorced therefrom* in order not to violate the laws of the United States and its Charter. After all, as Burlington Northern notes in its reply brief at page 40: 'The Commodities Clause [of the Hepburn Act] enacted in 1906 remains unchanged to this day.'" (Cert. App. 57-58.)

The trial court added:

> "Taconite became a commercial product in the mid-1960's, and it has been determined that there are millions of tons of taconite to be mined out of the ore properties in question, which will take perhaps one hundred years or more. Burlington Northern, of course, looks upon this as a windfall which was contemplated by the trust. The settlor's intent was quite to the contrary. Whatever of value was in the lands was to belong to the certificate holders. The mining of taconite was never dreamed of at the time of the execution of the trust, and even as late as 1951, when there was no taconite income, the Trustees in their report to the certificate holders indicated that commercial production would not be started for many, many years, and that the experimental stages in commercial production which had been conducted for some time would continue for years before the mining of taconite would be commercially feasible. [Arms Exhibit 65, Report of 1951]
>
> The idea of a windfall to Burlington Northern is a concept of very recent origin and one which was undoubtedly conceived as a result of the proceedings

herein. Neither Burlington Northern nor its predecessor, Great Northern, had ever contemplated that the reversion would have any commercial or monetary value. *They had never referred to it in their records, never shown it in any way in their books of account, and had never placed any value upon it either prior or subsequent to the commercial production of taconite.* [See Burlington Northern Response to Request for Admissions, No. 1aa, Tr. 418-419] Moreover, Burlington Northern and its predecessor, Great Northern, recognized that under the laws of the United States *as they were at the time of the execution of the trust and at all times since that time, the railway could never become the owner of commercially mineable ore properties, even if it did not intend to transport them over its railway.*" (Cert. App. 61-62.)

(ii) Trust Created Because of Hepburn Act

It was the enactment of the Hepburn Act on June 29, 1906, that led to the creation of the Trust. To be sure, the Commodities Clause was not to become effective until June 1, 1908.

But there it was.

And the statute had to be faced.

Asked on the trial by Burlington Northern to state the purpose of the Trust (Burlington Northern Interrogatory 6), the Trustees responded:

> "(a) To enable Great Northern Railway to avoid the consequences of the Commodities Clause."

Frank Claybourne, counsel for the Trustees, told the trial court:

> "There was a Hepburn Act passed back in 1906 with a Commodities Clause in it preventing a railroad from hauling things like iron ore from its own mines or its own properties. *They wanted to divorce the railroad from hauling their own properties.*" (T 149.)

Francis D. Butler, also counsel for the Trustees, assured the trial court:

> "there is no doubt but that *if it weren't for the Commodities Clause this Trust would not exist.* The Commodities Clause said that no railroad could carry any product of mines which it owned or product of plants which it owned over its lines." (T 167.)

James J. Hill was in no doubt. He knew that, in view of the statute, the railroad could not own ore property, directly or indirectly, then or in the future, if it wished to reap the benefit of iron ore freight revenues. He testified in the Congressional hearing:

> "THE CHAIRMAN: You do not claim that the Great Northern Railway Co., under the present interstate commerce act, could own and operate the Mahoning mine as a merchant mine?
>
> MR. HILL: I have just said it could not.
>
> MR. GARDNER: That is what I meant in asking whether it was a Federal law.
>
> THE CHAIRMAN: That *would be clearly within the commodities clause* of that act." (SR 16-17.)

It was the Hepburn Act, Judge Donovan concluded in *Hill v. Reynolds* (D.C. Minn., 1948), 75 F. Supp. 408, that barred Great Northern from ownership of the ore properties. The court said:

> "The trust, no doubt, at the time of its creation was conceived by those in control of the Great Northern Railway Company for the purpose of divorcing holdings of natural resources from the Railway Company, so as to comply with the Hepburn Act passed by Congress in June, 1906, 49 U.S.C.A. § 1 et seq." 75 F. Supp. at 412.

On appeal in *Reynolds v. Hill* (8th Cir., 1950), 184 F.2d 294, the court ruled:

"The setting and circumstances present the picture of large interrelated holdings of mineral lands, which had been amassed for the purpose of making additional earnings for the stockholders of the Great Northern Railway Company and of being the source of hauling revenues for the Railway itself. On such a control of natural resources by a carrier, Congress in 1906 laid its restraining hand, through the enactment of the Hepburn Act, 49 U.S.C.A. § 1(8), and the Great Northern Railway was faced with the situation of having to divorce itself from connection with these holdings." 184 F.2d at 297-298.

(iii) The Holding of the Minnesota Supreme Court

The Supreme Court of Minnesota reversed the judgment of the trial court. (Cert. App. 66.)

In face of the Hepburn Act, the Minnesota Supreme Court ordered the properties *"returned"* to the railroad (Cert. App. 11)—which had never owned them in the first place (Cert. App. 32-33, 54), or claimed any interest therein until this suit was brought. (Cert. App. 32-34, 62.)

The Minnesota Supreme Court recognized (Cert. App. 9) that the Hepburn Act made it unlawful for Great Northern (and whatever rights Burlington Northern has it must trace through Great Northern) to transport iron ore in which it has *"any"* interest, "direct *or* indirect." The Minnesota Supreme Court (Cert. App. 9) thought it "not clear" that the Railroad would have been deemed to have an "interest" in the ore—forgetting that, whatever the interest, the Commodities Clause was a bar.

This holding, relied upon by the Minnesota Supreme Court to escape the Hepburn Act, falls in face of that court's adjudication that the Railroad *does have* an interest in "the properties." The "properties," the court held, *must be returned* to the Railroad. (Cert. App. 11.) A clearer adjudication of "interest", or a more flagrant misconstruction of the Hepburn Act, it is difficult to imagine.

The Railroad's interest in these properties the Minnesota Supreme Court in addition, confirmed, by holding that Lake Superior Company (which owned and controlled the ore mines) was *"the instrumentality of Great Northern."* (Cert. App. 10.)

What the Minnesota Supreme Court thought "not clear" (Cert. App. 9) it adjudged clear. (Cert. App. 11.)

The Minnesota Supreme Court worked it out this way:

"The Commodities Clause of the Hepburn Act, now 49 U.S.C.A., § 1(8), upon which the court particularly focused, *prohibits* a railroad from carrying ore mined or produced by it *or under its authority* or in which it may have *any* interest, direct *or* indirect. *It is not clear* that immediately after the creation of the trust in 1906 Great Northern's carriage of ore mined from the trust properties would have violated the Hepburn Act, for *it is not clear* that it would have been deemed to have *any interest* in the ore. It was not until 1913 that the railroad acquired Lake Superior's interest in the trust, and we are not prepared to say that this transfer 7 years later is controlling in ascertaining the intent of the grantor when this trust was drawn. Even if the carriage of the ore were held to be illegal, moreover, it does not follow that this alone would render invalid what is an otherwise valid provision in this trust." (Cert. App. 9.)

The Minnesota Supreme Court conceded:

"the trust instrument executed on December 7, 1906, states that Lake Superior holds the property 'for the benefit of the shareholders of the Great Northern Railway Company.'" (Cert. App. 11.)

The Minnesota Supreme Court then demonstrated, ineluctably, the violation of the Commodities Clause of the Hepburn Act in its further holding that:

"In 1913 Great Northern succeeded to Lake Superior's interest in the trust, and Burlington Northern has since succeeded to Great Northern's. Any *property*

returned to Burlington Northern by the trustees would therefore be held only for Burlington Northern's own benefit." (Cert. App. 11.)

Thus, although the Hepburn Act denies to Burlington Northern, one of the two principal haulers from the Mesabi, *any* interest *"direct or indirect,"* the statute is held no bar because it "is not clear" whether the railroad has an interest in the properties the court ordered *"returned" to it.*

REASONS FOR GRANT OF THE WRIT

1. The Minnesota Supreme Court has misconstrued the Commodities Clause of the Hepburn Act and thereby despoiled the approximately 10,000 certificate holders of property that but for the misconstruction would come to them. Despite the Hepburn Act's prohibition of *"any"* interest, "direct *or indirect*" the Minnesota Supreme Court held it "not clear" that such a prohibited "interest" would exist notwithstanding it ordered the ore lands conveyed to the railroad.

If such "interest" be "not clear" then is the Hepburn Act denuded of meaning.

2. This Court has not looked at the Commodities Clause of the Hepburn Act for 28 years and what it then ruled does not justify the Minnesota Supreme Court's interpretation of the statute. This Court early shaped the statute in a direction at variance with the construction given the statute by the Minnesota Supreme Court in this case. This is illustrated by:

> *Delaware, Lackawanna and Western Railroad Company v. United States* (1913), 231 U.S. 363, where the Court in an opinion by Mr. Justice Lamar held the Commodities Clause (p. 370) is "a constitutional exercise of a governmental power intended to cure or prevent the evils that

> might result if, in hauling goods in or out, the Company occupied the dual and inconsistent position of public carrier and private shipper," and that the statute (p. 370) "applies not only to those particular instances in which the carrier did use its power to the prejudice of the shipper, but to all shipments which, however innocent in themselves, come within the scope and probability of the evil to be prevented."
>
> *United States v. Reading Company* (1920), 253 U.S. 26, where the Court in an opinion by Mr. Justice Clarke held (p. 60) "The purpose of the commodity clause was to put an end to the injustice to the shipping public, which experience had shown to result from discriminations of various kinds, which inevitably grew up where a railroad company occupied the inconsistent positions of carrier and shipper."

In 1936 and 1948, however, in a pair of cases, *United States v. Elgin Joliet & Eastern Railway Co.* (1936), 298 U.S. 492, and *United States v. South Buffalo Railway Co.* (1948), 333 U.S. 771, the Court, over sharp dissents, put some play in the words of the Commodities Clause—but *not* enough to justify the construction given the statute by the Minnesota Supreme Court.

Both of those cases involved short-line railroads connecting industrial plants with main-line carriers.

Elgin, 298 U.S. 492, dealt with the Chicago Outer Belt Line, owned by United States Steel Corporation. It had 195 miles of track and carried the products of the steel mills (p. 497) to "every railroad entering Chicago". *South Buffalo*, owned by Bethlehem Steel, provided a like service to the Bethlehem Steel Works in the Buffalo area. It supplied (333 U.S. at 773) "the sole terminal connection between this industry and the trunk-line railroads. It operates about 6 miles of main-line track and 81 miles of spur

track, 58 miles of its trackage being on leased right-of-way within the steel plant where it connects with other trackage owned by the Steel Company itself."

In *Elgin* Mr. Justice McReynolds, writing for the Court, was sharply challenged by Justices Stone, Brandeis and Cardozo. The dissenting Justices took the view that the statute:

> "is concerned with transportation of commodities by a rail carrier where the carrier and the producer and shipper are so dominated by the same interest, through the exercise of power secured by stock ownership, as to make rebates, discriminations, attempts to monopolize and other abuses of carrier power, easy, and their detection and punishment difficult." 298 U.S. at 506.

The *South Buffalo* case was decided on the authority of *Elgin* and the asserted failure of Congress to challenge the *Elgin* decision. The Court, in *South Buffalo,* speaking through Mr. Justice Jackson, observed:

> "It is enough to say that if the *Elgin* case were before us as a case of first impression, its doctrine might not now be approved." 333 U.S. at 774.

Justices Rutledge, Black, Douglas and Murphy dissented. They considered:

> "This is another case where the Court saddles Congress with the load of correcting its own emasculation of a statute, by drawing from Congress' failure explicitly to overrule it the unjustified inference that Congress approves the mistake. I think that *United States v. Elgin, Joliet and Eastern R. Co.,* 298 U.S. 492, was decided in the teeth of the commodities clause, 49 U.S.C. § 1(8), that it should now be overruled, and that this conclusion is dictated by the legislative history which the Court misreads, in my opinion, as giving basis for the opposite one." 333 U.S. at 785-786.

In their view:

> "Only by the most sophisticated, or unsophisticated, process of reasoning can it be concluded that any one of the many subsidiary members of this integrated steel-producing empire has no interest in the operations of every other member." 333 U.S. 786-787.

Two points need to be noted:

First: the principle on which the *Elgin* and *South Buffalo* short-line cases were held clear of the Commodities Clause of the Hepburn Act cannot reasonably apply to a multi-state trunk-line carrier such as Burlington Northern.

Second: here is opportunity to reexamine the construction given the Commodities Clause in the short-line cases, which seven Justices of this Court have condemned, and to correct the misconstruction given the statute by the Minnesota Supreme Court which erodes the statute out of existence.

CONCLUSION

The Minnesota Supreme Court has misconstrued the Hepburn Act, an important federal statute, and stripped it of meaning. But for that misconstruction the Minnesota Supreme Court could not have taken the Mesabi lands from the nearly 10,000 certificate holders and ordered that when the Trust ends these lands be "returned" to Burlington Northern, although neither it nor its predecessor, Great Northern, ever owned them. (Cert. App. 32-33.)

In all of the 66 years of the Trust, until this suit was brought, neither Great Northern Railway nor Burlington Northern Inc. has shown any value on its books for any interest in the Trust-held property. (Cert. App. 34, 62; B-N Admissions 1(x) and (y); SR 328.) Neither Great Northern nor Burlington Northern has so much as hinted in any report to shareholders or in any published statement in all of the 69 years of the Trust that it has any interest whatever in any of that property. (Cert. App. 34, 62; B-N Admissions (z) and (aa); and response 1(bb); SR 328.)

Even in the proxy statements issued in connection with the March 2, 1970, merger that brought Burlington Northern Inc. into being, neither Great Northern nor any constituent company so much as listed, even by description, an interest in the Trust-held property. (T 418-419.) Nor have the Trustees ever carried a value on their books for any interest of Great Northern or Burlington Northern in the Trust assets. (Trustees' Answer to Arms Interrogatory 18: SR 507-508.)

The misconstruction of the Hepburn Act, but for which the Minnesota Supreme Court could not have ruled as it did, deserves the attention of this Court.

Respectfully submitted,

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